Atlas Insulation, Incorporated *and* International Association of Heat and Frost Insulators & Asbestos Workers, AFL–CIO, Local 114. Case 15–CA–16365

October 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charge filed by the Union on November 13, 2001, and January 28, 2002, the General Counsel issued the complaint on January 31, 2002, against Atlas Insulation, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the Act.[1] The Respondent failed to file an answer.

On March 8, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On March 11, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated February 22, 2002, notified the Respondent that unless an answer was received by March 4, 2002, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with its principal office and place of business in Jackson, Mississippi (the office), has been engaged in the business of installing industrial insulation. During the 12-month period ending January 31, 2002, a representative period, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 in States other than Mississippi, and purchased and received at its Jackson, Mississippi office, as well as various jobsites within Mississippi, goods valued in excess of $50,000 directly from points outside the State of Mississippi. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Association of Heat and Frost Insulators & Asbestos Workers, AFL–CIO, Local 114 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Jim Scott and Charles "Junior" Hallman were the coowners of the Respondent, and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

On about August 17, 2001, the Respondent, by Jim Scott at the office on two occasions, promised its employees benefits if they would withdraw their membership in the Union; solicited its employees to withdraw their membership in the Union; and solicited its employees to persuade other employees to withdraw their membership in the Union.

The Respondent, by Charles "Junior" Hallman at the office, on about September 1, 2001, informed its employees that they were assigned to distant jobsites because of their union activities; and on about September 18, 2001, informed its employees that it was surveying its employees' union activities, and that the Respondent could not trust its employees because they engaged in union activities.

Since about September 2001, the Respondent has assigned its employees who were union supporters to more onerous working conditions by assigning them to distant jobsites.

On about September 11, 2001, the Respondent terminated Phillip Jordan, and on about September 18, 2001, the Respondent terminated Kenny Mixon Jr. and Kimmy Mixon.

On about October 25, 2001, the Respondent laid off Albert Dunaway, Ben Hawkins, George Hawkins, Dennis McCullough, Robert McDaniel, and Joey Smith. On about October 31, 2001, the Respondent laid off Steven McKenzie, Jimmy Price, Adam Thornton, and other similarly situated employees who names are currently unknown.

The Respondent terminated and laid off the above employees, and assigned them to distant jobsites because the employees joined or assisted the Union and engaged

[1] On February 25, 2002, the Acting Regional Director issued an erratum correcting a date in par. 13 of the complaint.

in concerted activities, and to discourage employees from engaging in these activities.

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and part time insulators and applicators employed by Atlas Insulation, Incorporated; excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

On about February 9, 2001, the Respondent, an employer engaged in the building and construction industry, entered into a collective-bargaining agreement effective for the period February 9, 2001 through June 30, 2002, by which it recognized the Union as the exclusive collective-bargaining representative of the unit.

Since about February 9, 2001, pursuant to the agreement described above, the Union has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.

On September 14, 2001, a representation election was conducted among the employees in the unit and, on October 31, 2001, the Union was certified as the exclusive collective-bargaining representative of the unit.

For the period from February 9, 2001 through October 31, 2001, and at all material times on and after October 31, 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about April 2001, the Respondent, contrary to the requirements of the collective-bargaining agreement, failed and/or refused to (1) provide the Union with reports listing manpower and man-hours worked; (2) remit union dues deducted from bargaining unit employee wages; (3) pay medical benefits; and (4) pay pension benefits.

Since about July 1, 2001, the Respondent failed and/or refused to grant pay raises as required by the agreement.

Since about August 2001, on at least seven separate occasions, the Respondent has failed and refused to use the Union's hiring hall to hire employees as required by the agreement, and has directly hired employees.

Since about September 2001, the Respondent failed and/or refused to pay wage rates as required by the agreement.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the conduct described above without obtaining the Union's consent with respect to this conduct and its effects.

On about August 17, 2001, the Respondent on two separate occasions, by Jim Scott at the office, bypassed the Union and dealt directly with unit employees by negotiating with them regarding their health insurance benefits and rates of pay.

In about September 2001, the Respondent, by Charles "Junior" Hallman at the office, bypassed the Union and dealt directly with its unit employees by negotiating with them regarding their rates of pay.

Since about September 19, 2001, the Respondent has withdrawn its recognition of the Union as the exclusive collective-bargaining representative of the unit, and has failed and refused to meet and deal with the Union as the exclusive collective-bargaining representative of the unit with respect to terms and conditions of employment.

CONCLUSIONS OF LAW

1. The Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by promising benefits to employees; soliciting employees to withdraw their membership in the Union; soliciting employees to persuade other employees to withdraw from the Union; informing employees that they were assigned to distant jobsites because of their union activities; and telling employees that the Respondent was surveying their union activities and that it could not trust its employees because they engaged in union activities.

2. In addition, by assigning employees to distant jobsites, and terminating and laying them off because they supported the Union and engaged in concerted activities, the Respondent has discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. Further, the Respondent has failed and refused to bargain with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by (1) terminating and laying off employees;[2] (2) failing and/or refusing to (a) provide the Union

[2] Member Cowen would deny the General Counsel's Motion for Summary Judgment insofar as it alleges that these unlawful discharges and layoffs also violate Sec. 8(a)(5) and (1) of the Act. In Member Cowen's view, unlawful discharges and layoffs cannot derivatively be found to be a bargaining violation. In this regard, Member Cowen notes that even after bargaining an employer may not discriminate against employees in violation of Sec. 8(a)(3) of the Act, and a union's agreement to such discrimination would itself constitute an independent violation of the Act.

with reports listing manpower and man-hours worked; (b) remit union dues deducted from unit employees' wages; (c) pay wage rates and medical and pension benefits; (d) grant pay raises; and (e) use the Union's hiring hall, all as required by the collective-bargaining agreement; (3) bypassing the Union and dealing directly with employees; and (4) withdrawing recognition of the Union.

The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by assigning unit employees who were union supporters to more onerous working conditions by assigning them to distant jobsites, we shall order the Respondent to rescind the discriminatory work assignments and reassign the employees to duties and conditions they had prior to September 2001.

Further, having found that the Respondent has violated Section 8(a)(3) and (1) by terminating Phillip Jordan, Kenny Mixon Jr., and Kimmy Mixon, and by laying off Albert Dunaway, Ben Hawkins, George Hawkins, Dennis McCullough, Robert McDaniel, Steven McKenzie, Jimmy Price, Joey Smith, Adam Thornton, and other similarly situated employees,[3] we shall order the Respondent to offer the discriminatees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We also shall order the Respondent to make the named and similarly situated discriminatees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall expunge from its files any references to the unlawful terminations and layoffs, and notify the named and similarly situated discriminatees in writing that this has been done and that the terminations and layoffs will not be used against them in any way.

In addition, having found that the Respondent has failed and refused to comply with the terms of the parties' February 9, 2001 through June 30, 2002 collective-bargaining agreement, we shall order the Respondent to (1) provide the Union with reports listing manpower and man-hours worked; (2) remit to the Union dues deducted from bargaining unit employees' wages, with interest as prescribed in *New Horizons for the Retarded*, supra; (3) pay the delinquent medical and pension benefits that have not been paid since April 2001;[4] (4) reimburse unit employees for any expenses ensuing from its failure to make the required medical and pension benefit payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra;[5] (5) grant pay raises and pay the wage rates required by the collective-bargaining agreement, pursuant to *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra; and (6) use the Union's hiring hall to hire employees.

In order to remedy the Respondent's unlawful failure to comply with the contractual hiring hall provisions, we shall order the Respondent, pursuant to *J. E. Brown Electric*, 315 NLRB 620 (1994), to offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union were it not for the Respondent's unlawful conduct, and to make them whole for any losses suffered by reason of the Respondent's failure to hire them. Reinstatement and backpay issues will be resolved by a factual inquiry at the compliance stage of the proceeding. Id. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, supra, plus interest as prescribed in *New Horizons for the Retarded*, supra.

Finally, having found that the Respondent has violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we shall order the Respondent to recognize the Union and bargain with it in good faith as the exclusive collective-bargaining representative of the unit employees, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry*

[3] The identity of these individuals shall be ascertained at the compliance stage of this proceeding.

[4] Including any additional amounts applicable to such delinquent payments as determined pursuant to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[5] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

Co., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Atlas Insulation, Incorporated, Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with International Association of Heat and Frost Insulators & Asbestos Workers, AFL–CIO, Local 114 as the exclusive collective-bargaining representative of the employees in the following unit:

> All full time and part time insulators and applicators employed by Atlas Insulation, Incorporated; excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit employees.

(c) Bypassing the Union and dealing directly with unit employees by negotiating with them regarding their health insurance benefits and rates of pay.

(d) Promising employees benefits if they withdraw their membership in the Union.

(e) Soliciting employees to withdraw their membership in the Union.

(f) Soliciting employees to persuade other employees to withdraw their membership in the Union.

(g) Informing employees that they were assigned to distant jobsites because of their union activities.

(h) Informing employees that it was surveying its employees' union activities.

(i) Telling employees that it could not trust its employees because they engaged in union activities.

(j) Assigning employees more onerous working conditions by assigning them to distant jobsites because they are union supporters.

(k) Terminating or laying off employees because they engage in union and concerted activities.

(l) Failing and refusing to provide the Union with reports listing manpower and man-hours worked, as required by the February 9, 2001 through June 30, 2002 collective-bargaining agreement between the Respondent and the Union.

(m) Failing and refusing to remit union dues deducted from unit employees' wages, as required by the agreement.

(n) Failing and refusing to pay medical and pension benefits, as required by the agreement.

(o) Failing and refusing to grant pay raises and pay wage rates, as required by the agreement.

(p) Failing and refusing to use the Union's hiring hall to hire employees, as required by the agreement.

(q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Reassign all employees who were assigned more onerous working conditions by being assigned to distant jobsites to the duties and conditions they had prior to September 2001.

(c) Within 14 days from the date of this Order, offer Albert Dunaway, Ben Hawkins, George Hawkins, Phillip Jordan, Dennis McCullough, Robert McDaniel, Kenny Mixon Jr., Kimmy Mixon, and Joey Smith, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(d) Within 14 days from the date of this Order, offer Steve McKenzie, Jimmy Price, Adam Thornton, and all other similarly situated employees laid off on October 31, 2001, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(e) Make whole Albert Dunaway, Ben Hawkins, George Hawkins, Phillip Jordan, Dennis McCullough, Robert McDaniel, Steve McKenzie, Kenny Mixon Jr., Kimmy Mixon, Jimmy Price, Joey Smith, Adam Thornton, and the similarly situated employees, for any loss of earnings and other benefits suffered as a result of their unlawful terminations and layoffs, with interest, in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Phillip Jordan, Kenny Mixon Jr., and Kimmy Mixon, and the unlawful layoffs of Albert Dunaway, Ben Hawkins, George Hawkins, Dennis McCullough, Robert McDaniel, Steve McKenzie, Jimmy Price, Joey Smith, Adam Thornton, and the similarly situated employees, and within 3 days thereafter, notify them in writing that

this has been done and that these discriminatory actions will not be used against them in any way.

(g) Provide the Union with the reports listing manpower and man-hours worked, as required by the agreement.

(h) Remit to the Union, with interest, the dues deducted from unit employees' wages, as required by the agreement.

(i) Pay the delinquent medical and pension benefits, with interest, that have not been paid since April 2001, and reimburse unit employees for any expenses ensuing from its failure to make the payments, with interest, as set forth in the remedy section of this decision.

(j) Grant pay raises and pay wage rates to the unit employees, as required by the agreement, and make the unit employees whole, with interest, for any losses suffered as a result of the Respondent's unlawful conduct.

(k) Use the Union's hiring hall to hire employees for vacancies, as required by the agreement.

(l) Offer immediate and full employment to those applicants who would have been referred to the Respondent by the Union as provided in the agreement were it not for the Respondent's unlawful conduct, and make them whole for any loss of earnings and other benefits suffered by reason of the Respondent's failure to hire them, with interest, in the manner set forth in the remedy section of this decision.

(m) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(n) Within 14 days after service by the Region, post at its facility in Jackson, Mississippi, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2001.

(o) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with International Association of Heat and Frost Insulators & Asbestos Workers, AFL–CIO, Local 114 as the exclusive collective-bargaining representative of the employees in the following unit:

> All full time and part time insulators and applicators employed by us; excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT withdraw our recognition of the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT bypass the Union and deal directly with unit employees by negotiating with them regarding their health insurance benefits and rates of pay.

WE WILL NOT promise employees benefits if they withdraw their membership in the Union.

WE WILL NOT solicit employees to withdraw their membership in the Union.

WE WILL NOT solicit employees to persuade other employees to withdraw their membership in the Union.

WE WILL NOT inform employees they were assigned to distant jobsite because of their union activities.

WE WILL NOT inform employees that we are surveying their union activities.

WE WILL NOT tell employees that we cannot trust our employees because they engaged in union activities.

WE WILL NOT assign employees more onerous working conditions by assigning them to distant jobsites because they are union supporters.

WE WILL NOT terminate or lay off employees because they engage in union and concerted activities.

WE WILL NOT fail and refuse to provide the Union with reports listing manpower and man-hours worked, as required by the February 9, 2001 through June 30, 2002 collective-bargaining agreement between us and the Union.

WE WILL NOT fail and refuse to remit union dues deducted from unit employees' wages, as required by the agreement.

WE WILL NOT fail and refuse to pay medical and pension benefits as required by the agreement.

WE WILL NOT fail and refuse to grant pay raises and pay employee wage rates as required by the agreement.

WE WILL NOT fail and refuse to use the Union's hiring hall to hire employees, as required by the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request meet and bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL reassign all employees who were assigned more onerous working conditions by being assigned to distant jobsites to the duties and conditions they had prior to September 2001.

WE WILL, within 14 days from the date of the Board's Order, offer Albert Dunaway, Ben Hawkins, George Hawkins, Phillip Jordan, Dennis McCullough, Robert McDaniel, Kenny Mixon Jr., Kimmy Mixon, and Joey Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Steve McKenzie, Jimmy Price, Adam Thornton, and all other similarly situated employees laid off on October 31, 2001, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make whole, with interest, Albert Dunaway, Ben Hawkins, George Hawkins, Phillip Jordan, Dennis McCullough, Robert McDaniel, Steve McKenzie, Kenny Mixon Jr., Kimmy Mixon, Jimmy Price, Joey Smith, Adam Thornton, and the similarly situated employees, for any loss of earnings and other benefits suffered as a result of their unlawful terminations and layoffs.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful terminations of Phillip Jordan, Kenny Mixon Jr., and Kimmy Mixon, and the unlawful layoffs of Albert Dunaway, Ben Hawkins, George Hawkins, Dennis McCullough, Robert McDaniel, Steve McKenzie, Jimmy Price, Joey Smith, Adam Thornton, and the similarly situated employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these discriminatory actions will not be used against them in any way.

WE WILL provide the Union with the reports listing manpower and man-hours worked, as required by the agreement.

WE WILL remit to the Union, with interest, the dues deducted from unit employees' wages as required by the agreement.

WE WILL pay the delinquent medical and pension benefits, with interest, that have not been paid since April 2001, and WE WILL reimburse unit employees for any expenses ensuing from our failure to make the payments, with interest.

WE WILL grant pay raises and pay wage rates to the unit employees, as required by the agreement, and WE WILL make unit employees whole, with interest, for any losses suffered as a result of our failure to grant those pay raises and to pay employees the contractual wage rates.

WE WILL use the Union's hiring hall to hire employees for vacancies, as required by the agreement.

WE WILL offer immediate and full employment to those applicants who would have been referred to us by the Union were it not for our unlawful conduct, and WE WILL make them whole for any loss of earnings and other benefits suffered by reason of our failure to hire them, with interest.

ATLAS INSULATION, INC.